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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PEARLY MARTIN, Defendant and Appellant.	A151556 (City & County of San Francisco Super. Ct. No. SCN225863)

A jury convicted Appellant Pearly Martin of five counts of making criminal threats with the use of a deadly weapon, one count of first-degree burglary of an occupied residence, and one count of vandalism. Appellant attacks her conviction and sentence on three grounds: first, testimony regarding prior uncharged incidences should have been stricken because the prosecutor failed to prove them up; second, the trial court improperly instructed the jury on the elements of first degree burglary; and third, her sentence for three of the criminal threats counts should have been stayed pursuant to California Penal Code section 654.[1] The sentencing issue she raises has merit, but the remaining contentions do not.

BACKGROUND

On April 25, 2016, appellant, along with two other individuals, confronted victims Marthe "Marciel" Sanchez, Victor "Vicky" Jimenez, Christian Palominos, Jonathan

[1] All statutory references are to the Penal Code.

Serrano, and Jose Herrera outside of the OMG Nightclub. Appellant began hurling insults at the group, and eventually pulled out a knife threatening to assault Sanchez. At that point, Herrera called the police, and Sanchez and Jimenez fled to their car. Before they could drive away, appellant, followed by her companions, approached the car and appellant began banging on it while continuing to yell obscenities. After the car drove away, appellant followed Herrera, Palominos, and Serrano into the Hotel Bayanihan House (Bayanihan), where Herrera resided. Once in the lobby, appellant threatened to kill the three men. Shortly thereafter, Officer Vincent Pedrini detained appellant while she was walking on Sixth Street and placed her in his patrol car. Appellant then became extremely agitated and kicked the window, causing damage to the door frame.

Appellant was charged with five felony counts of making criminal threats pursuant to section 422, one count of first-degree burglary of an occupied residence pursuant to section 459, two felony counts of false imprisonment pursuant to sections 236, and one count of misdemeanor vandalism pursuant to section 594, subdivision (b)(2)(A). The information further alleged, as enhancements, that appellant used a deadly weapon during the commission of the felonies pursuant to section 12022, subdivision (b)(1), and that she committed these felonies because of the victims' respective genders or sexual orientations pursuant to section 422.75, subdivision (a).

On April 11, 2017, a jury found appellant guilty of the criminal threats, burglary, and vandalism charges, and acquitted her of the false imprisonment charges. The jury found true the deadly weapon allegations with respect to the criminal threats charges, but found the allegation not true with respect to the burglary charge. The jury also found not true the hate crime enhancement allegations as to the burglary charge and four of the five criminal threats charges, but was unable to reach a finding as to the enhancement for the remaining criminal threats charge. The court sentenced appellant to nine years in prison. Appellant filed a timely notice of appeal.

DISCUSSION

I. Impeachment

Appellant's first claim is that the prosecutor violated a court order by attempting to impeach appellant by eliciting from her facts from uncharged assaults in 2009 and 2014, and that the court should have stricken that testimony when the prosecutor failed to call witnesses to prove up the earlier assaults. We agree in part, but find that any error was harmless.

The prosecution filed a motion in limine seeking to admit appellant's prior uncharged conduct, should appellant testify or the defense introduce evidence of appellant's nonviolent character. The prosecution presented a number of uncharged incidents it wished to use to impeach appellant. The court ruled that a 2014 domestic violence incident in which appellant was reported to have attacked her boyfriend with a pair of scissors qualified as a crime of moral turpitude because it was an assault with a deadly weapon, and the evidence could come in if appellant testified. After initially reserving judgment as to a 2009 uncharged assault with pepper spray, the court also ruled that the 2009 assault would be admissible as a crime of moral turpitude, presumably because the court concluded pepper spray qualified as a deadly weapon. Because the 2014 and 2009 incidents were not convictions, the court ruled that the prosecutor would have to prove up the conduct should appellant deny it.

At trial, the prosecutor cross-examined appellant about the 2009 and 2014 incidents. With respect to the 2009 assault, we find no error. Although appellant denied recalling specific details of the 2009 assault, she did admit to pepper spraying a woman in the face in a liquor store, and therefore the prosecutor did not have to offer additional proof of that incident. With respect to the 2014 incident, however, the prosecutor failed to comply with the court's order requiring him to prove up the allegation of moral turpitude if appellant denied it. In response to the prosecutor's questions, appellant

admitted to a fight with a former boyfriend resulting in the imposition of a mutual protective order. But appellant categorically denied using scissors in the fight or engaging in conduct other than mutual combat, and thus disqualified the 2014 incident as a crime of moral turpitude. Had defense counsel requested it, we assume the court would have stricken the testimony after the prosecutor failed to call witnesses to prove up the assault with a deadly weapon. The prosecutor's mistake was exacerbated by his rebuttal argument in closing, where he described the 2014 incident as if he had established appellant assaulted her boyfriend with scissors. The prosecutor not only assumed facts not in evidence in his argument, but also inappropriately characterized the 2014 and 2009 incidents as evidence of appellant's propensity for violence when they had been admitted only to impeach appellant's character.

Because defense counsel did not object to the prosecutor's questions and no motion to strike the testimony was made, any argument on this issue has been forfeited. (See *People v. Doolin* (2009) 45 Cal.4th 390, 434; *People v. Fuiava* (2012) 53 Cal.4th 622, 670.) "In the absence of a timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed." (*People v. Clark* (1992) 3 Cal.4th 41, 125–126.)

In any event, any failure to strike the testimony was harmless. Reversal of a conviction is not required "unless it is reasonably probable the outcome would have been more favorable to defendant had such evidence been excluded." (*People v. Carter* (2005) 36 Cal.4th 1114, 1152.) Appellant has not demonstrated how the outcome would have been different had the prosecutor's line of questioning been stricken, given that the testimony in question was that appellant did *not* assault her boyfriend with scissors in 2014, and that other evidence—the 2009 assault with pepper spray, two felony convictions for selling drugs—established that appellant had a record for acts of moral turpitude. Additionally, at the close of trial, the court instructed the jury not to consider the attorney's questions and arguments as evidence.

II. Jury Instruction for First Degree Burglary

Appellant's second contention is that the court erred by instructing the jury, "[a] lobby of an occupied residential building is an inhabited part of a building." We review claims of error in jury instructions de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) We find no error.

At the close of evidence, the parties discussed jury instructions. Relying on *People v. Wilson* (1989) 209 Cal.App.3d 451 (*Wilson*) and *People v. Nunley* (1985) 168 Cal.App.3d 225 (*Nunley*), the prosecutor requested a pinpoint instruction with regard to the burglary charge. The pertinent portion of the instruction provided, "a lobby of an occupied residential building is considered an inhabited part of the building." Over defense counsel's objection, the court read the proposed pinpoint instruction.

Appellant first claims that the court defined burglary to an extent that is contrary to the legislature's intent, but this claim lacks any basis in law. The trial court correctly relied on *Wilson* and *Nunley* in adopting the pinpoint instruction. In *Nunley* the court held that a defendant could be convicted of first-degree burglary where he enters the lobby of an apartment building with the intent to burglarize a particular apartment. (*Nunley, supra,* 168 Cal.App.3d at p. 230.) "Anyone who enters a building with the intent to commit a felony is guilty of burglary even though permission to enter has been extended to him personally or as a member of the public." (*Id.* at p. 232.) The court in *Wilson* applied the principles in *Nunley* to the lobby of a hotel, and held that "a lobby is an integral part of a hotel for purposes of determining whether a robbery occurring in the lobby is punishable as a first-degree offense." (*Wilson, supra,* 209 Cal.App.3d at p.453.) Applying these principles to this case, we find that the trial court provided an accurate statement of law to the jury.

Appellant next claims that by providing the pinpoint instruction at issue, the trial court directed the jury to find appellant guilty of residential burglary. Although an

instruction may not be " 'crucially erroneous, deficient, or misleading on [its] face,' " it may become so in particular circumstances. *(People v. Nguyen* (1988) 204 Cal.App.3d 181, 188.)

People v. Fox (1997) 58 Cal.App.4th 1041 and *People v. Thorn* (2009) 176 Cal.App.4th 255 are instructive on this issue. The trial courts in both *Fox* and *Thorn* instructed their respective juries that a carport or garage that is "attached to an inhabited dwelling house" is considered part of that dwelling house. (*Thorn, supra,* at p. 266; *Fox, supra,* at p. 1045.) Much like in this case, the defendants in both *Fox* and *Wilson* objected on the grounds that the trial court's instruction prevented the jury from deciding a material issue of fact. (*Fox*, at p. 1045; *Thorn*, at pp. 267–268.) The appellate courts rejected that argument, indicating that the juries still had to determine (1) that the " 'structure' " entered by the defendants was " 'inhabited,' " and (2) that the garage or carport was " 'attached' " to the " 'inhabited structure.' " (*Fox*, at p. 1047; *Thorn*, at p. 268.) Here, in order to convict appellant, the jury still had to determine that appellant had entered Bayanihan with the intent to commit a felony, and that Bayanihan was a residential building.

The trial court properly instructed the jury as to the elements of first-degree burglary.

III. Sentencing

Appellant's final contention is unopposed by the respondent. Appellant points out that the trial court should have stayed sentencing on the criminal threats against Palominos, Serrano, and Herrera in light of the burglary conviction. We agree.

At appellant's sentencing, the court did not apply section 654 to stay punishment for the criminal threats, finding that "they were independent and not merely incidental to each other. The defendant entertained several criminal objectives as to separate victims . . . making Penal Code 654 inapplicable to these crimes." The court sentenced appellant to nine years by imposing a four-year base term for the burglary, and a consecutive eight-

month term, enhanced with an additional four months, on each of the criminal threats made with the use of a knife.

"Section 654 precludes multiple punishments for . . . an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) Although section 654 does not apply to violent crimes against multiple victims (*id*. at p. 592), the jury found not true the deadly weapon enhancement in connection with the burglary, rendering that conviction nonviolent. Because the burglary and the threats in the lobby of the Bayanihan were committed with a single intent, the trial court should have stayed sentencing on the three criminal threat convictions associated with the burglary.

DISPOSITION

Appellant's convictions are affirmed, but the case is remanded for resentencing in accordance with this opinion.

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TUCHER, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.